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In The

Supreme Court of the United States

October Term, 1974

No. 73-5768

FRANK XAVIER FRANCISCO,
Petitioner,

v.

J. S. GATHRIGHT, SUPERINTENDENT
BLAND CORRECTIONAL FARM,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, J. S. Gathright, Superintendent of Bland Correctional Farm, an employee of the Commonwealth of Virginia, respectfully submits the following brief on the merits on a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The parties will be referred to herein by their respective positions in the court below, *i.e.*, petitioner and respondent.

QUESTIONS PRESENTED

The respondent hereby restates the questions presented in order to more accurately and fully reflect the issues before this Court:

1. Did The Petitioner, In A Federal Habeas Corpus Proceeding, Fully Exhaust His State Court Remedies Prior To Filing His Federal Petition Where The Petitioner Still Had Available To Him A Means For Relief In The State Court, And Where The Issues Before The Federal District Court Had Not Been Fully Decided In Their Present Context By The Courts Of The State?

2. May A Federal Court In A Federal Habeas Corpus Proceeding Withhold A Determination Of One Allegation Of The Petitioner Upon Which Petitioner Had Exhausted His State Court Remedies, And Await The Outcome Of State Court Proceedings On Another Allegation On Which Petitioner Had Not Exhausted His State Court Remedies, In A Situation Where The Outcome Of The Allegation In The State Courts Had The Probability Of Making The Exhausted Allegation A Moot Question Before The Federal Court?

STATEMENT OF THE CASE

In his brief herein, the petitioner has set forth some of the background facts which were developed at his state court trial on the charge of illegal possession of drugs with intent to distribute and which relate to his allegation of illegal search and seizure. The respondent directs the attention of the Court to the opinion of the United States District Court for the Eastern District of Virginia in *Frank Xavier*

Francisco v. *J. S. Gathright, Superintendent of Bland Correctional Farm,* (C.A. No. 430-72-A-M), which is included in the appendix to the petitioner's brief (App'x., pp. 36-41), and which contains a detailed review of the factual circumstances surrounding the petitioner's arrest and conviction in the state courts.

Petitioner was convicted in the Circuit Court of Fairfax County, Virginia, on May 28, 1971, for illegal possession of a controlled drug with intent to distribute, in violation of § 54-524.101(a) of the Code of Virginia (1950), as amended. Following his conviction, the petitioner appealed to the Virginia Supreme Court by way of direct appeal, alleging in his petition for a writ of error a number of grounds, including "Whether defendant's warrantless arrest was based on probable cause?"; "Whether probable cause alone is sufficient to authorize a police officer to validly make a forcible entry int a dwelling to arrest a person therein without an arrest warrant?"; "Whether the warrantless, forcible entry of defendant's dwelling to effect his arrest was necessitated by exigent circumstances?"; "Whether the arresting officers exceeded the permissible scope of a search and seizure incident to defendant's arrest?", all of which allegations were argued in his petition for a writ of error to the Virginia Supreme Court under the category of illegally obtained evidence; and including the allegation of "Whether it is proper to instruct the jury that conviction for possession of a controlled drug with intent to distribue may be based solely on evidence as to the quantity of the drug possessed" (App'x., pp. 29-32). His petition for a writ of error was denied and his conviction affirmed, without a written opinion.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of Virginia, Alexandria Division, alleging that his convic-

tion in Fairfax County Circuit Court was invalid, and raised in said petition the allegations of (a) illegal arrest and illegal search and seizure and (b) the use of an improper instruction as to the effect of quantity of drugs possessed on the proof of intent. This latter allegation, in particular, was to the effect that petitioner was contending "that the statute under which he was convicted is unconstitutional, (at least as applied to him) as a denial of due process of law in contravention of his rights under the Fourteenth Amendment to the Constitution of the United States, particularly insofar as it provides in Va. Code § 54-524.101(a) that conviction 'may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed.' " (App'x. p. 8).

In his responsive pleading thereto, entitled "Answer," the respondent admitted that both of the petitioner's allegations had been raised in his direct appeal to the Virginia Supreme Court, and therefore petitioner had technically exhausted his state court remedies as to those allegations. Respondent, however, pointed out further that following the denial of petitioner's petition for a writ of error to the Virginia Supreme Court, that same Court handed down the decision in *Sharp* v. *Commonwealth*, 213 Va. 269, 192 S.E.2d 217 (1972). Respondent stated in his answer that "under the holding in *Sharp*, it would appear that the granting of Instruction G. in the petitioner's trial constituted reversible error, and petitioner would be entitled to a new trial. Respondent says further, however, that it should be left up to the State courts to determine whether the petitioner's case is controlled by *Sharp* or whether there are sufficient facts to differentiate or distinguish petitioner's case from *Sharp*."

The United States District Court in its opinion of January 23, 1973, denied petitioner relief on the merits on his

allegation of illegal arrest and illegal search and seizure and withheld ruling on his second allegation, agreeing with the respondent that it shoud be left to the State courts to determine whether petitioner's case is controlled by *Sharp* v. *Commonwealth, supra*. In addition, the District Court ordered the Commonwealth, although not technically the respondent, to afford the petitioner a plenary hearing on that allegation within forty-five days of the entry of the order, although not citing any authority for such action, and although the respondent has some question as to the authority of the District Court to enter such an order.

Nevertheless, the Commonwealth proceeded to comply with the District Court's order and filed a motion in the Circuit Court of Fairfax County requesting that Court to appoint counsel for the petitioner in order to file a petition for a writ of habeas corpus and to grant the petitioner an immediate hearing on said petition when filed. (App'x. pp. 47, 48). After consultation with counsel for the respondent, Judge Millsap of the Fairfax County Circuit Court, being somewhat unclear of the extent of his authority to grant the petitioner a plenary hearing in a habeas corpus matter without a petition for a writ of habeas corpus having been filed, instructed the clerk of his court to forward the forms for that purpose to the petitioner, notifying counsel for the respondent of this action by letter dated Feburary 5, 1973. (See Exhibit A, attached to this brief).

No response was received by the Circuit Court of Fairfax County from the petitioner pursuant thereto, and Judge Millsap then informed Judge Bryan of the United States District Court of the failure of the petitioner to file a petition for a writ of habeas corpus, advising Judge Bryan of all that had been done in an effort to bring on the matter before the Circuit Court of Fairfax County, and advising Judge Bryan that he felt it was impossible to grant

the petitioner a plenary hearing unless he filed a petition for a writ of habeas corpus. (See Exhibit B. attached to this brief). After further consultation with counsel for the respondent and with Judge Byran, Judge Millsap, upon his own initiative, appointed counsel to represent the petitioner and to assist the petitioner in bringing forward the matter by way of a petition for a writ of habeas corpus. (See Exhibit C. attached to this brief). Pursuant to that appointment, and after further discussion between counsel for the respondent, the counsel appointed to represent the petitioner and Judge Millsap, it was agreed that a hearing would be held in the Circuit Court of Fairfax County, with the petitioner present in person, to determine just what further steps should be taken in this matter.

Prior to the holding of this hearing, the Circuit Court of Fairfax County, Virginia, was advised of the fact that petitioner had been represented in the federal habeas corpus proceedings by Daniel C. Kaufman, Esquire; and counsel for the petitioner appointed by Fairfax County Circuit Court, Daniel E. Feldman, Esquire, contacted Mr. Kaufman and advised him of the pendency of the hearing in Fairfax County Circuit Court. That hearing was held on July 27, 1973, and both Mr. Feldman and Mr. Kaufman appeared on behalf of the petitioner, Mr. Feldman being relieved of his duty by the court and Mr. Kaufman being appointed in his place. A transcript of that hearing was made and is attached hereto as Exhibit D. At that hearing before the Circuit Court of Fairfax County, Virginia, on July 27, 1973, petitioner, through his counsel, specifically refused to proceed to obtain habeas corpus relief in the State courts and specifically refused to cooperate with the State courts in granting petitioner a plenary hearing to determine whether he should in fact be entitled to a new trial on the basis of *Sharp* v. *Commonwealth, supra,* even though Judge Millsap

indicated an apparent willingness to grant petitioner a new trial.

It was during this same period of time that petitioner's appeal to the United States Court of Appeals for the Fourth Circuit from the decision of the United States District Court, Eastern District of Virginia, was pending, and following said hearing in Fairfax County Circuit Court, the decision of the Fourth Circuit was rendered.

LAW AND ARGUMENT

1. Did The Petitioner, In A Federal Habeas Corpus Proceeding, Fully Exhaust His State Court Remedies Prior To Filing His Federal Petition Where The Petitioner Still Had Available To Him A Means For Relief In The State Court, And Where The Issues Before The Federal District Court Had Not Been Fully Decided In Their Present Context By The Courts Of The State?

At the time of petitioner's conviction in the Circuit Court of Fairfax County, Virginia, § 54-524.101(a) of the Code of Virginia (1950), as amended, under which petitioner was convicted, included a provision that a conviction for violation of that section may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed. That provision was subsequently repealed by the Virginia legislature. Although the petitioner raised the validity of that statutory presumption in his petition for a writ of error in his direct appeal to the Virginia Supreme Court, the Virginia Supreme Court did not grant the petition for a writ of error and affirmed the petitioner's conviction, without opinion, therefore not stating exactly why this issue was not considered grounds for a reversal. Nevertheless, the Virginia Supreme Court subsequently decided the case of *Sharp* v. *Commonwealth,* 213 Va. 269, 192 S.E.2d 217 (1972), specifically holding that the statutory presumption referred to above was unconsti-

tutional. In *Sharp* v. *Commonwealth*, the Virginia Supreme Court did not state one way or the other whether the inclusion of such a statutory presumption as an instruction at a trial would *automatically* be grounds for reversal of a defendant's conviction. In fact, the Virginia Supreme Court, has, since *Sharp* v. *Commonwealth* was decided, refused to grant petitions for writs of error in other cases where a so-called *Sharp* instruction was given, without stating the reasons for denying such ruling.

For this reason, and for the additional reason that the inclusion of the instruction in question might in fact be harmless error, the respondent took the position in his responsive pleading in the United States District Court in the instant case that relief should not be automatically granted to the petitioner on the instruction issue, but that the Virginia courts should be given the opportunity to determine whether the inclusion of such an instruction in petitioner's trial was in fact grounds for invalidating his conviction and granting him a new trial. Of course, the United States District Court agreed with this position of the respondent, as did the United States Court of Appeals for the Fourth Circuit. At this point in time, the petitioner had, and continues to have to this day, an ample and adequate remedy in the Virginia State courts, to have the validity of his conviction determined in light of *Sharp* v. *Commonwealth*. Respondent has never, at any time, attempted to stop the petitioner from proceeding in the State courts, and has in fact cooperated fully to allow the petitioner full opportunity to proceed in the State courts.

In addition, the Circuit Court of Fairfax County, Virginia, has literally bent over backwards to allow the petitioner to proceed in the State courts on this issue and has agreed to grant the petitioner a plenary hearing and a forum for determining such issue, even though the petitioner refused to file a petition for a writ of habeas corpus in that Court, and even though there might be some question as to the authority of the Circuit Court of Fairfax County, Virginia, to proceed with a habeas corpus proceeding absent the filing of such a petition. Nevertheless, if the Circuit Court of Fairfax County had granted such a plenary hearing, without the necessity of filing a petition, respondent would not have objected and would have concurred in holding such plenary hearing and would have concurred in the granting of petitioner's day in court to decide whether or not his conviction is tainted by the use of this instruction. Despite all of this, the petitioner has continued to refuse to cooperate with the State courts and has continued to insist that he wants his relief in federal courts, although the respondent is at a loss as to what difference it makes whether relief is granted in the State courts or granted in the federal courts, since in either case the result is that the Commonwealth would be given the opportunity to retry the petitioner. In fact, if petitioner had cooperated with the Fairfax Circuit Court he might be a free man today.

It is clear that the decision of the United States District Court, and affirmed by the United States Court of Appeals for the Fourth Circuit, was granted on the doctrine of exhaustion of state remedies. This doctrine is granted in Title 28 U.S.C. § 2254 which provides that:

> "a. The Supreme Court, a Justice thereof, a circuit judge, or a district court, shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties by the United States.
>
> "b. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment

of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"c. An applicant shall not be deemed to have exhausted the remedies available of the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

In the instant case there is not an absence of available State corrective process and there are no circumstances existing which render such process ineffective to protect the rights of the petitioner. Furthermore the petitioner does have the right under the law of Virginia to raise the question presented, and in fact was given full opportunity to do so by the Circuit Court of Fairfax County, Virginia. Therefore, petitioner's situation falls clearly within the specific language of 28 U.S.C. § 2254.

Petitioner, in his brief, has pointed out that the exhaustion doctrine flows from the decision of this Court in *Ex parte Royall,* 117 U.S. 241, 29 L.Ed. 868, 6 S.Ct. 734 (1886), and that a further comprehensive discussion of the exhaustion doctrine appears in *Fay* v. *Noia,* 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963). It was pointed out in *Fay* v. *Noia* that in extending the habeas corpus power of the federal courts to what was conceived to be its constitutional limit, the Habeas Corpus Act "clearly enough portended difficult problems concerning the relationship of the State and federal courts in the area of criminal administration." It was further pointed out that even though the federal courts had the power to discharge a State prisoner restrained in violation of the Federal Constitution, ordi-

narily the federal court should stay its hand on habeas corpus pending completion of State court proceedings. "This qualification plainly stemmed from considerations of comity rather than power, and envisaged the postponement, not the relinquishment, of federal habeas corpus jurisdiction, which had attached by reason of the allegedly unconstitutional detention and could not be ousted by what the State court might decide." The rationale of the exhaustion of State remedies doctrine has remained the same, and that is that "it would be unseemly in our dual system of government for a federal district court to upset a State court conviction without an opportunity for the State courts to correct a constitutional violation." This doctrine of comity embraced in the exhaustion requirement is a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers and already cognizant of the litigation have had an opportunity to pass upon the matter. In *Fay* v. *Noia, supra,* this Court specifically held that 28 U.S.C. § 2254 is limited in its application to failure to exhaust State remedies "still open to the habeas applicant at the time he files his application in federal court."

This is precisely the situation that exists in the instant case. Although the Virginia Supreme Court has held the statutory presumption which was the basis of the instruction in the petitioner's trial to be unconstitutional, the Virginia courts have not yet determined whether the use of that unconstitutional statuory presumption in a jury instruction at petitioner's trial was such as to warrant a reversal of his conviction and to grant him a new trial. At the time that petitioner's appeal to the Virginia Supreme Court was effected, that statutory presumption had not yet been found to be unconstitutional. Therefore, the Virginia Supreme Court has not yet ruled upon the question which confronted

the federal district court in the instant case, and it was entirely appropriate as an exercise of the comity doctrine established through the exhaustion of state remedies principle for the federal district court to defer to the State courts to make a definitive ruling on that issue. Just as this Court held in *Fay* v. *Noia*, the district court application of the exhaustion of State remedies was proper because the instant case was a situation where the petitioner had failed to exhaust State remedies which were still open to him at the time he filed his federal habeas corpus petition.

The exhaustion of state remedies doctrine has been further explored in an article in the Harvard Law Review, frequently cited by this Court, (see Note, Developments in the Law—Federal Habeas Corpus, 83 Harv.L. Rev. 1938 (1970)) and in many other decisions of this Court. In said article, the author noted that the federal courts have refused habeas corpus applications from State prisoners until they have first utilized all of their remedies available in the State courts in order to avoid upsetting State court convictions without first allowing the states an opportunity to correct constitutional defects. This rule of exhaustion is rooted in considerations of federal-state comity rather than in the essential nature of the writ of habeas corpus.

> "The significant interest protected by the exhaustion requirement are of two types. First, exhaustion preserves the role of the State courts in the application and enforcement of federal law. Early federal intervention in State criminal proceedings would tend to remove federal questions from the State courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, exhaustion preserves orderly administration of State judicial business, preventing the interruption of State adjudication by federal habeas proceedings. It is important that petitioners reach

> State appellate courts, which can develop and correct errors of State and federal law and most effectively supervise and impose uniformity on trial courts."

In the instant case, the same reasoning applies. To require petitioner to first seek his relief in the state courts would prevent federal intervention in an appropriately state court matter, that is the determination for the first time of a federal constitutional issue in the state courts. Further, it would preserve the orderly administration by allowing the state courts to develop the state principles to be followed in determining a matter of constitutional magnitude.

In *Irvin* v. *Dowd*, 359 U.S. 394, 3 L.Ed.2d 900, 79 S.Ct. 825 (1959), the Court noted that there is inherent in federal habeas corpus the potentiality of conflict between federal and State courts, and that because of this, this Court developed the doctrine of exhaustion of State remedies and that, except in cases of peculiar urgency, the federal courts ought not to exercise their habeas corpus jurisdiction by a discharge of a state prisoner in advance of a final determination of his case in the courts of the State. In *Henry* v. *Mississippi*, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965), this Court, in remanding a matter back to the State courts for an initial determination, acknowledged that by permitting a State court to make an initial determination of a possible federal question, "we serve the cause of efficient administration of criminal justice, and of harmonious federal-state judicial relations." It was further noted that such a disposition may make unnecessary the processing of the case through the federal courts which were already laboring under congested dockets, or it may make unnecessary the relitigation in a federal forum of certain issue. The same reasoning is certainly applicable in the instant case since the efficient administration of criminal justice could easily be

handled by having the State court set aside the petitioner's conviction, if it is entitled to be set aside, and immediately begin to retry the petitioner rather then by going through the lengthy process of federal habeas corpus proceeding and possible appeals therefrom. Furthermore, such a disposition in the State courts would make unnecessary the processing of the case through the federal courts and would make unnecessary the re-litigation in a federal forum of issues which could easily be decided in the State court. It should be always kept in mind that the State courts attempted to grant petitioner the sought for relief and he specifically refused to cooperate with that court, insisting instead that he would proceed in the federal courts.

By the same token, the following reasoning of Justice Brennan, in his concurring opinion in *Case* v. *Nebraska,* 381 U.S. 336, 14 L.Ed.2d 422, 85 S.Ct. 1486 (1965), is particularly appropriate to the instant case:

> "The desirability of minimizing the necessity for resort by State prisoners to federal habeas corpus is not to be denied. The federal system trusts the States with primary responsibility for the administration of their criminal laws, the Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and State procedures ideally included adequate administration of these guarantees as well. If, by effective corrective processes, the States assumed this burden, the exhaustion requirement of 28 U.S.C. § 2254 (1958 ed.) would clearly promote State primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that non-meritorious claims would be fully ventilated, making easier the task of a federal judge if the State prisoner pursued his cause further. . . . Greater finality would inevitably attach to State court determinations of federal constitutional questions because evidentiary hearings on federal habeas corpus would . . . prove unnecessary."

The action of the federal district court in requiring further exhaustion in the instant case was directly in line with these principles. The State of Virginia was assuming its burden of providing an effective corrective process, and the exhaustion requirement in the instant case clearly promoted the initial determination of a factual as well as legal question of constitutional magnitude, thereby either vindicating without any need for federal court intervention a meritorious claim, or fully ventilating all of the possible arguments on a non-meritorious claim before the petitioner proceeded further with his federal habeas corpus proceeding.

The need for comity, for deference to initial State court determinations, and for an increasing emphasis on the principle of federalism, has consistently been recognized by this Court. See concurring opinion of Justice Douglas in *Parisi* v. *Davidson,* 405 U.S. 34, 50, 31 L.Ed.2d 17, 32, 92 S.Ct. 815 (1972); and see concurring opinion of Justice Powell in *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973).

As well as in *Fay* v. *Noia, supra,* this Court also stated in *Humphrey* v. *Cady,* 405 U.S. 504, 31 L.Ed.2d 394, 92 S.Ct. 1048 (1972), that 28 U.S.C. § 2254 requires exhaustion where there are State remedies still open to the habeas corpus petitioner at the time he applies for habeas corpus in the federal courts. This is the exact situation which existed in the instant case. Although the petitioner had presented an issue to the Virginia Supreme Court involving the constitutionality of the statutory presumption, which was made a part of an instruction to the jury at his trial, this question

had not yet been presented to the State court in the light of the decision in *Sharp* v. *Commonwealth, supra,* and in light of the question of whether petitioner's conviction was invalid because that instruction was used at his trial. Obviously, this was not the issue confronting the Virginia Supreme Court when petitioner directly appealed his conviction, since the Virginia Supreme Court had not yet decided the case of *Sharp* v. *Commonwealth.* Therefore, in effect the petitioner in his federal habeas corpus petition was raising an allegation which had to be decided in a different context than when it had previously been raised in the Virginia Supreme Court. The State courts, in the instant case, have not yet been provided with an opportunity to apply controlling legal principles to the facts bearing upon petitioner's constitutional claim. The substance of petitioner's constitutional claim, in its present posture, has not yet been presented to the State courts. *Picard* v. *Connor,* 404 U.S. 270, 30 L.Ed. 2d 438, 92 S.Ct. 509 (1971).

While there is no requirement that petitioner file repetitious applications in the State courts, *Wilwording* v. *Swenson,* 404 U.S. 249, 30 L.Ed.2d 418, 92 S.Ct. 407 (1971); *Brown* v. *Allen,* 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (1953), there is still open in the instant case a question of whether petitioner's claim, in its present posture, is so clearly distinct from the claim he presented on direct appeal that it may fairly be said that the State courts have had no opportunity to pass upon the present claim; and if so whether there is presently available a state forum in which he can effectively present the claim. *Humphrey* v. *Cady, supra.* To require exhaustion in the present situation would be nothing more than allowing the State courts the opportunity for a determination of the issue in light of an intervening change in the law, and in light of the uniqueness of the facts of petitioner's case to that change in the law, before requiring the federal courts to exercise habeas corpus relief. See *Sigler* v. *Parker,* 396 U.S. 482, 24 L.Ed.2d 672, 90 S.Ct. 667 (1970); *c.f. Gusik* v. *Schilder,* 340 U.S. 128, 95 L.Ed. 146, 71 S.Ct. 149 (1950). The action of the federal district court in the instant case was an appropriate exercise of the district court's discretion to deny relief to an applicant under certain circumstances. *Fay* v. *Noia,* 372 U.S. 391, 438, 9 L.Ed. 2d 837, 869, 83 S.Ct. 822 (1963).

The respondent submits that the instant case is distinguishable in a number of ways from *Roberts* v. *LaVallee,* 389 U.S. 40, 19 L.Ed.2d 41, 88 S.Ct. 194 (1967), relied upon by the petitioner. In the first place, *Roberts* v. *LaVallee,* involved a question which was purely one of federal law, and did not involve any question of factual determination. In the instant case the question is at least a mixed one of federal law as well as State law. In order to make a proper determination in the instant case it was necessary for the federal district court to apply federal law, to apply State law, and to determine factual issues in order to determine whether the petitioner's conviction was made infirm by the use of the questioned instruction. This was contrary to the situation in *Roberts* where the issue involved was no longer open to question.

Furthermore, in the instant case there was clearly yet to be determined the question of whether the use of the questioned instruction in petitioner's trial was a situation of harmless error. A determination of harmless error can remove from a case a question of federal constitutional error, otherwise cognizable on habeas corpus. *Milton* v. *Wainwright,* 407 U.S. 371, 33 L.Ed.2d 1, 92 S.Ct. 2172 (1972).

In other words, *Roberts* v. *LaVallee, supra,* involved a question which was purely one of federal law, while the instant case the question that would be before either the State court or the federal district court is at the most a

mixed question of State and federal law. This distinction has been recognized, for instance, in *Singer* v. *Meyers,* 384 F.2d 279 (3rd Cir. 1967), which cites both *Jackson* v *Denno,* 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774 (1964), a case which involved an important interest of the State and in which remand to the State was held to be proper, and *Roberts* v. *LaVallee, supra,* where no State issue was involved and no remand was required. See also, *United States ex rel Gockley* v. *Meyers,* 411 F.2d 216 (3rd Cir. 1969), cert.den. 396 U.S. 847, 24 L.Ed.2d 96, 90 S.Ct. 96.

Another distinction between *Roberts* v. *LaVallee in the* instant case is that *Roberts* involved a situation where remand to the State courts for initial determination would be unnecessarily burdensome and time consuming. The petitioner, in his brief, submits that the same reasoning should apply to his case. However, the fact of the matter is that more litigation in the instant case would not have been time consuming and otherwise burdensome, since the federal district court had given the State courts a certain period of time within which to act, and the State courts had in fact attempted to act within that time limit. The only thing that is making the petitioner's case time consuming and burdensome to the federal courts is the petitioner's continued insistence that he obtain his relief in the federal courts and his continued insistence to proceed in the federal courts rather than going ahead and getting the case over once and for all in the State courts, as was attempted herein by the respondent. Furthermore, *Roberts* v. *LaVallee* did not involve any fact-finding of any kind to determine whether he should be entitled to relief or not; however, in the instant case some findings of fact would be necessary to determine whether the petitioner's case is controlled by *Sharp* v. *Commonwealth, supra,* and to determine whether the use of the

unconstitutional instruction in petitioner's case was such as to make his conviction void. It is appropriate that any such findings of fact be done first by the State courts. See *O'Neil* v. *Nelson,* 422 F.2d 319 (9th Cir. 1970).

The petitioner consistently has argued that to require him to exhaust his remedies in the State courts, as was required by the federal district court in the instant case, is to require him to make repetitious applications for relief in the State courts. However, the fact of the situation is that he was not being required to make repetitious applications to the State courts, but was simply being required to make one application to the State court for a determination of the merits of his case. And as can be seen, the State courts attempted to give him that opportuniy. He cannot now come to this Court and complain because of the action of the federal district court, when in fact it was the petitioner himself who prevented the State courts from acting, not the respondent and not the officials of the State. *Fay* v. *Noia, supra,* recognized that habeas corpus has traditionally been regarded as being governed by equitable principles, and that among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Certainly the equitable principle of coming to the court with clean hands is applicable in the instant case where the petitioner has done his best to prevent the State courts from granting him the relief sought and has insisted instead that he be granted habeas corpus relief in the federal courts. While the respondent is not contending that this is a situation of deliberate bypass of the State courts, see *Murch* v. *Mottran,* 409 U.S. 41, 34 L.Ed.2d 194, 93 S.Ct. 71 (1972), the situation is certainly analogous to a situation of deliberate bypass of State courts.

The petitioner, in his brief, appears to indicate that the

action of the United States District Court, which was affirmed by the United States Court of Appeals for the Fourth Circuit, in requiring the petitioner to go back to the State courts to determine the merits of his allegation was one of forcing him to be batted back and forth between two judicial systems and had the result of delaying unnecessarily the granting of his sought after relief. However, as pointed out above, the fact of the matter is that petitioner would have had his sought for relief long ago if he had proceeded in the State courts initially, as he should have done, or at least had agreed to cooperate with the Circuit Court of Fairfax County, Virginia, when that Court offered him the opportunity to proceed. This matter would not be before this Court at this time and would not any longer be a matter of federal court consideration if the petitioner had simply brought his proceeding for a petition for a writ of habeas corpus in the courts of Virginia. If the petitioner had a valid and meritorious claim for relief, the Virginia State courts have always been ready, willing and able to grant that relief, and furthermore the determination of whether petitioner has such grounds for relief is a factual question which should first be determined in the State courts.

The respondent is not attempting to interpose further delay to the petitioner's right of habeas corpus whatsoever, but has attempted from the beginning to expedite the granting of habeas corpus proceedings in the Virginia State courts in order to determine the merits of petitioner's allegation.

One further comment should be made in connection with the assertion in the petitioner's brief herein that the issue he has presented to the federal district court is the identical issue that was presented to the Virginia Supreme Court, and that that issue was not in any way affected by the intervening decision of the Virginia Supreme Court in *Sharp* v.

Commonwealth, supra. For this proposition the petitioner relies upon the fact that in his petition for a writ of error on his direct appeal to the Virginia Supreme Court he relied to some extent upon *Leary* v. *United States,* 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969), and that *Leary* was relied upon by the Supreme Court of Virginia to invalidate the challenged instruction on federal constitutional grounds in *Sharp* v. *Commonwealth.* However, the respondent submits that a close reading of *Sharp* v. *Commonwealth* shows clearly that the Virginia Supreme Court did not rely upon *Leary,* but relied upon preceding opinions of the Virginia Supreme Court, and relied primarily upon the fact that the instruction in question was in violation of the Virginia Constitution. Furthermore, the petitioner, in his petition for a writ of habeas corpus in the federal district court herein, did not cite *Leary* v. *United States* in any way whatsoever to support his relief in the federal district court. Simply because the petitioner has attempted to claim that his issue is the same now as it was on his direct appeal before the Virginia Supreme Court is not conclusive on the question of whether it is in fact the same issue. While it is the same instruction that is in question, it is the applicability of that instruction to the petitioner's trial and the applicability of the validity of that instruction which is a completely different issue in its present posture than it was before the Virginia Supreme Court on petitioner's direct appeal. Accordingly, petitioner has not exhausted his State court remedies on the issue in its present posture, and the federal district court in the instant case was properly following the doctrines and dictates of this Court in the cases referred to above relating to the exhaustion of State remedies in requiring the petitioner to first exhaust his remedies in the State courts. Petitioner was not a "ping pong ball batted back and forth between judicial systems," but was a State court prisoner

who was given the opportunity to have the State courts determine whether his conviction was void, and if so to then proceed to a new trial. Petitioner's appropriate proceeding should have been in the State courts in the first instance and not in the federal district court, and the action of the federal district court in requiring him to go back to the State courts, and the further action of the State courts in giving him every opportunity to challenge his conviction, was an appropriate procedure and should not be reversed by this Court.

2. May A Federal Court In A Federal Habeas Corpus Proceeding Withhold A Determination Of One Allegation Of The Petitioner Upon Which Petitioner Had Exhausted His State Court Remedies, And Await The Outcome Of State Court Proceedings On Another Allegation On Which Petitioner Had Not Exhausted His State Court Remedies, In A Situation Where The Outcome Of The Allegation In The State Courts Had The Probability Of Making The Exhausted Allegation A Moot Question Before The Federal Court?

The United States Court of Appeals for the Fourth Circuit determined that the federal district court was premature in reaching the merits of petitioner's allegations of illegal arrest and illegal search and seizure, as long as petitioner was going to be required to exhaust his remedies in the State courts on the issue of the *Sharp* instruction. In particular, the Fourth Circuit held that "if relief is granted under *Sharp*, the State will have the option of releasing Francisco or retrying him. In either event, the possibility exists that this claim for relief will be mooted." Therefore, the Court of Appeals was relying upon a doctrine that the federal courts should abstain from deciding exhausted habeas corpus allegations when they are joined in a petition which also includes unexhausted allegations, and where the State court determination of those unexhausted claims and

allegations, would have the possible effect of making it unnecessary for the federal courts to have to make any decision on the allegations which have been exhausted. Although this issue appears to never have been directly before this Court, the Court of Appeals opinion was a recognition of the principle that dismissal of both exhausted and unexhausted claims, to await exhaustion, was proper where the claims where closely related or where the State court decision might make federal determination of the claims moot. *United States ex rel Martin* v. *McMann*, 348 F.2d 896 (2nd Cir. 1965); *United States ex rel McBride* v. *Fay*, 370 F.2d 547 (2nd Cir. 1966); *United States ex rel Irving* v. *Casscles*, 448 F.2d 741 (2nd Cir. 1971); *Mosley* v. *Smith*, 470 F.2d 1320 (5th Cir. 1973). In *Blair* v. *California*, 340 F.2d 741 (9th Cir. 1965), discussed by the petitioner in his brief, the Court of Appeals also took cognizance of the fact that the need for them to rule on the exhausted claim might be mooted by the action of the State court on the unexhausted claim. (See 340 F.2d 741, 745 n. 7).

A close reading of *United States ex rel Deflumer* v. *Mancusi*, 380 F.2d 1018 (2nd Cir. 1967), also indicates that the possibility of mootness was great. In *Deflumer*, the unexhausted claim related to voluntariness of the plea of guilty, therefore a favorable ruling in State court meant either discharge of the prisoner or a new trial and an unfavorable State ruling meant that the exhausted claim was waived. In either case the possibility of mootness was substantial. In *Mosley* v. *Smith, supra*, the Court of Appeals said that to defer ruling may avoid piece-meal litigation and may avoid need for the federal courts to act at all, an implicit recognition of the doctrine of deferral in a situation of possible mootness.

To the contrary, those cases where courts of appeals have not disturbed the rulings of the district courts where an ex-

hausted claim was considered, even though when joined with unexhausted claims, have involved situations where there was not the presence of the possibility of mootness, or have involved situations where the procedural problem was not presented to the court of appeals as such. For instance, *Anderson* v. *Johnson*, 371 F.2d 84 (6th Cir. 1966), referred to by the petitioner in his brief, did not involve a situation of possible mootness, since the federal court, while noting that one of petitioner's allegations had not been exhausted, also found that allegation to be totally without merit, and therefore there was no real issue of multiple claims. In *United States ex rel Boyance* v. *Meyers*, 372 F.2d 111 (3rd Cir. 1967), the federal habeas corpus petition did not include the unexhausted claim, therefore distinguishing that case considerably from the instant situation. The only claim pending before the federal court in *Boyance* had been fully exhausted. The same is true of the case of *United States ex rel Sniffen* v. *LaFollette*, 393 F.2d 726 (2nd Cir. 1968), where the unexhausted claim was one on which the petitioner could not obtain federal relief anyway. (See 393 F.2d 726, 727 n.1).

In addition to those circuits which have followed the rule referred to above, where the exhausted claims and the unexhausted claims were closely related, or where there was a possibility of mootness, the Fifth Circuit Court of Appeals appears to have adopted a general rule requiring full exhaustion of all State court remedies before recognition of federal habeas corpus. The leading case dealing directly with this issue is *Wheeler* v. *Beto*, 407 F.2d 816 (5th Cir. 1969), a case where the petitioner had failed to present one of his four federal allegations to the State courts:

> "While it is true that appellant has exhausted his State remedies as to the other issues presented in his petition, considerations of comity dictate against having his case pending in State and federal courts at the same time. Moreover, we believe that considerations of judicial efficiency dictate against piece-meal litigation of petitioner's claims in federal court. . . ."

The Court then proceeded to hold that such dismissal of all of the claims by the district court, without predjudice, was not an abuse of that court's discretion. See accord *Johnson* v. *Wainwright*, 453 F.2d 385 (5th Cir. 1971); *Harrison* v. *Wainwright*, 424 F.2d 633 (5th Cir. 1970); *Green* v. *Beto*, 460 F.2d 322 (5th Cir. 1972); *Madeley* v. *Kern*, 488 F.2d 865 (5th Cir. 1974).

By the same principle referred to above, the case of *Hewett* v. *North Carolina*, 415 F.2d 1316 (4th Cir. 1969), is distinguishable from the instant case because in *Hewett* the Fourth Circuit Court of Appeals was ready to grant relief setting aside convictions which had been fully served, therefore there was no possibility of a retrial of the petitioner, and the federal decision would not be mooted by any pending State proceedings. *Tyler* v. *Swenson*, 483 F.2d 611 (8th Cir. 1973), is also distinguishable because in *Tyler* the federal courts would still have to eventually decide the exhausted issues, no matter what happened in the State courts. The Court of Appeals in *Tyler* further recognized an exception to the rule being applied therein for unusual circumstances. Unusual circumstances has been determined by the Fourth Circuit in the instant case to be a situation where the possibility of mootness is present.

The petitioner argues in his brief that the federal courts should have decided the search and seizure issue, prior to his obtaining a possible retrial in the State courts, because that issue would not again be cognizable in the State courts and the only way that issue could be determined in his favor

is if it was so determined by a federal court. However, this proposition fails to recognize that the practical result of that would be to have a federal court determining an issue of search and seizure in a case where the petitioner could very possibly obtain relief from his pending State court conviction and either be released completely or at the worst, subject to a retrial. Therefore, the situation would be present where the federal courts were determining an issue of search and seizure in merely an advisory capacity. Even if petitioner was retried in the State courts, the question of whether the seized evidence would be admissible in such trial, would not be dependent upon any decision in the federal courts one way or the other, but would be a fresh decision before the trial court. No determination favorable to the petitioner on that issue would be binding on the trial court at petitioner's retrial. In fact it would be entirely possible that the facts relating to whether the search and seizure was valid or not would be substantially different at a potential retrial, what with the passage of time, the loss of possible witnesses, the differences in memory of the individuals involved from such passage of time, etc. Therefore, if the petitioner pursued his State court remedies, as the district required him to do, and obtained a favorable result in the State courts, then the question of the validity of the search and seizure, in the federal courts, would be moot. The Court of Appeals was proper in requiring that that decision be held in abeyance until the outcome of the State court decision on the instruction issue had been determined.

Once again the petitioner seems bound and determined to have his case decided by the federal courts, although it's not necessary for him to do so, and appears to be convinced he is not capable of receiving due process and a fair trial in the State courts.

Respondent submits that the action of the Court of Appeals in this case was entirely proper, since it had the effect of preventing the federal courts from being put in a position of rendering advisory opinions or rendering opinions on matters that were moot.

CONCLUSION

For the foregoing reasons, the respondent submits that the decision below should be affirmed.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

GILBERT W. HAITH
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, the undersigned, certify that three copies of the foregoing Brief were mailed to Daniel C. Kaufman, Arent, Fox, Kintner, Plotkin & Kahn, 1815 H Street, N.W., Washington, D. C. 20006, counsel for the Petitioner, on or before June 21, 1974.

GILBERT W. HAITH
Assistant Attorney General

EXHIBIT "A"

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA
Prince William County Fairfax County
Alexandria City

[SEAL]

Arthur W. Sinclair
Barnard F. Jennings
James Keith
William G. Plummer
Lewis D. Morris
Percy Thornton, Jr.
Burch Millsap
James C. Cacheris
Judges

Fairfax County Courthouse,
Fairfax, Virginia 22030,
February 5, 1973.

Mr. Gilbert W. Haith,
Assistant Attorney General,
Supreme Court Building,
1101 East Broad Street,
Richmond, Virginia 23219

Re: Francisco v. J. S. Gathright,
Superintendent.

Dear Mr. Haith:

The Clerk of the Court has this date mailed to Mr. Francisco three copies of the forms for petition for writ of habeas corpus to be executed and filed by the petitioner in this court. Mr. Francisco has been advised that upon filing the petition for writ of habeas corpus counsel would

be appointed for him and the case scheduled for trial immediately.

The Clerk of the Court will forward to you a copy of the petitioner's writ of habeas corpus when the same has been received.

Very truly yours,

/s/ Burch Millsap

BM:elc

EXHIBIT "B"

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA
Prince William County Fairfax County
Alexandria City

[SEAL]

Arthur W. Sinclair
Barnard F. Jennings
James Keith
William G. Plummer
Lewis D. Morris
Percy Thornton, Jr.
Burch Millsap
James C. Cacheris
Judges

Fairfax County Courthouse,
Fairfax, Virginia 22030,
June 12, 1973.

Honorable Albert V. Bryan, Jr.,
Judge, United States District Court,
Eastern District of Virginia
Post Office Building,
Alexandria, Virginia 22313

Re: Frank Xavier Francisco v. J. S. Gathright;
Your Civil Action 430-72-A-M.

Dear Judge Bryan:

Mr. Gilbert W. Haith, Assistant Attorney General for the Commonwealth of Virginia, in compliance with your order concerning the above-captioned case, filed a motion requesting the appointment of counsel and immediate filing of a petition for a writ of habeas corpus in this court on behalf of Mr. Francisco. Mr. Young, administrative clerk

of the court, and at the request of the court, mailed to Mr. Francisco on February 5, 1973, three petitions for writ of habeas corpus. Mr. Young requested expeditious filing of the petition and informed Mr. Francisco that an attorney would be appointed to assist him upon filing of the petition.

This court has not received any communication from Mr. Francisco and Mr. Francisco has not filed with the court a petition for writ of habeas corpus, therefore the court feels it cannot comply with your request to afford a hearing to Mr. Francisco within 45 days. The court will immediately give him a hearing upon the filing of a petition with the court for a writ of habeas corpus.

Very truly yours,

/s/ Burch Millsap

BM:elc
cc: Gilbert W. Haith, Esq.

EXHIBIT "C"

VIRGINIA:

IN THE CIRCUIT COURT OF
FAIRFAX COUNTY
FRANK XAVIER FRANCISCO,
Petitioner,

vs.

J.S. GATHRIGHT, Superintendent
Bland Correctional Farm,
Respondent.

It appearing to the Court that counsel should be appointed in this case to consult with the Petitioner and investigate any matter which the Defendant desires to bring to the Court's attention.

It is therefore, Adjudged and Ordered that David E. Feldman, an able and experienced Attorney at Law, practicing before this Court be appointed to represent the Petitioner to consult, and investigate and assist the Petitioner in filing any petitions which he desires to file.

Enter: June 19, 1973

/s/ Burch Millsap
Judge

A Copy Teste:

W. Franklin Gooding, Clerk

By: /s/ Ann B. Cherrix
Deputy Clerk

[1]

EXHIBIT "D"

VIRGINIA:

IN THE CIRCUIT COURT OF
FAIRFAX COUNTY

Criminal No. 16767

COMMONWEALTH OF VIRGINIA

v.

FRANK X. FRANCISCO

Fairfax, Virginia
Friday, July 27, 1973.

The above-entitled matter came on for hearing before The Honorable Burch Millsap, Judge of the Circuit Court of the County of Fairfax, in Court Room No. 4 of the Fairfax County Court House, commencing at 10:00 A.M., on Friday, the 27th day of July, 1973.

Appearances:

On behalf of the Commonwealth:
Gilbert W. Haith, Esq.
Assistant Attorney General

On behalf of the defendant:
David E. Feldman, Esq.
and
Daniel C. Kaufman, Esq.

[2] PROCEEDINGS

(The Court Reporter was first duly sworn.)

The Court: Commonwealth of Virginia versus Frank X. Francisco. Are the parties ready? Is Mr Francisco present? Have a seat at counsel table.

Let the record show that the Commonwealth of Virginia is represented by its Assistant Attorney General. The defendant is present in court represented by his attorney, Mr. Feldman.

Mr. Feldman: For the record, Your Honor, I did get ahold of Mr. Kaufman the other day and I assume this is Mr. Kaufman.

Mr. Kaufman: Yes.

Mr. Feldman: He indicated he would like to stay on the case. He did not realize this proceeding was coming up, so if the Court would have no objection, I have no objection to withdrawing from the case.

The Court: Mr. Kaufman, did you represent the defendant in the federal proceeding?

Mr. Kaufman: Yes, I did.

The Court: Are you still representing him in federal proceedings?

Mr. Kaufman: Yes, I am.

The Court: The Court would give Mr. Feldman leave [3] to withdraw as counsel for Mr. Francisco and would appoint Mr. Kaufman to represent Mr. Francisco. Have you discussed this with Mr. Francisco to see if there is any objection?

Mr. Kaufman: Yes, we have and he has no objection.

The Court: He is agreeable to your appointment?

Mr. Kaufman: Yes.

Mr. Feldman: Thank you, Your Honor.

The Court: This matter is coming on somewhat on motion of the Court because of the federal court proceedings wherein the federal court granted the request of the Attorney General that this matter be resolved in a state court rather than on the federal level.

The Court directed the Clerk to mail to the defendant forms for the filing of a petition for a writ of habeas corpus and after a sufficient length of time had expired, the defendant having failed to file the petition for a writ of habeas corpus and after notifying the defendant that counsel would be appointed to represent him upon the filing of the writ, the Court then directed that he be returned to the Fairfax County Jail for the appointment of counsel.

As of this time no motions are pending before the court and the Court would be interested, Mr. Kaufman, in any [4] statements you might have to the court if it's your intention to file any motions, not file any motions, if you have been directed by Mr. Francisco to file or not file.

Mr. Kaufman: I would state as follows, Your Honor. I have discussed this matter fully with Mr. Francisco and it is my advice to him that he not file a state habeas corpus petition and he has agreed with me that it is not in his best interest to so do and he would object to any state habeas corpus proceedings being conducted in this matter.

The Court: On the motion for a new trial, he directed you not to file such a motion on his behalf?

Mr. Kaufman: I have discussed the matter with him fully and he has come to the conclusion it would not be in his best interest to obtain a new trial and for that reason no motion has or will be filed for a new trial on that basis.

The Court: Do you have any statements?

Mr. Haith: Yes, sir, Your Honor.

The Commonwealth, has under an order from the Federal District Court, to grant Mr. Francisco a plenary hearing or otherwise a habeas corpus hearing on the state court level on the issue of the Sharp versus Commonwealth case.

It is the Commonwealth's position that the refusal of the defendant to accept state habeas corpus proceedings [5] would, in fact, be a voluntary waiver of any right to exhaust his remedies in the state court on that issue and I simply want to make sure for the record that the defendant is fully aware of the fact that this can be construed as a waiver and it will be the Commonwealth's position that it is, in fact, a waiver of his right to have a new trial on the Sharp issue.

The Court: The Court is in receipt of a letter from Judge Albert V. Bryan, United States District Court for the Eastern District of Virginia. He stated he did not feel the petition would have to take any initiative. The Court is not clear as to the intention of Judge Bryan in that statement. If, and in the event, the Attorney General was directed to file a petition for a new trial, the motion for the new trial in the court on the Sharp case, would the defendant, Mr. Francisco, cooperate in the case?

Mr. Kaufman: I have not fully discussed this particuar aspect of it but my present feeling is that he would not so cooperate and it's our position that we have fully exhausted all of our state remedies in accordance with the relevant

decisions of the United States Supreme Court and to allow the state to obtain a new trial on whatever grounds it chooses would be a violation of Mr. Francisco's right against double jeopardy.

[6] The Court: Does Mr. Francisco wish to take the stand and make any statement for the record?

The Defendant: No, Your Honor.

The Court: Any further statement?

Mr. Haith: Well, Your Honor, in light of the petition of the defendant, there is nothing else the Commonwealth can do. I intend to submit this back to Judge Bryan on the basis that the defendant has intentionally waived his right to state court relief and has intentionally bypassed the state courts in this matter and will never be entitled to a new trial on the grounds of the Sharp issue.

The Court: It would be the opinion of the Court that if the defendant in this case directs his counsel not to proceed in any manner in the state court and also upon any action by the Attorney General by way of motion to bring the case before the Court, the Court cannot force upon this defendant any state proceeding if he does not wish to pursue it himself.

The Court, I do not believe, would have the authority to represent the defendant, so, therefore, there is no proceedings in the Commonwealth of Virginia.

The Court will remand the defendant to the custody of the sheriff to await transportation back to Bland Correctional [7] Institute.

Mr. Haith: Thank you, Your Honor.

(Whereupon, at 10:10 A.M., the hearing in the above-entitled matter was concluded.)

[8] CERTIFICATE OF REPORTER

I, William B. Peters, a Certified Verbatim Reporter, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled matter to the best of my knowledge and ability.

/s/ William B. Peters
Certified Verbatim Reporter

William B. Peters
Stenographic Reporter
4055 Chain Bridge Road
Fairfax, Virginia
273-2400